

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

ORIGINAL

76-7108

United States Court of Appeals
FOR THE SECOND CIRCUIT

DRYWALL TAPERS AND POINTERS OF GREATER
NEW YORK, LOCAL 1974,

and

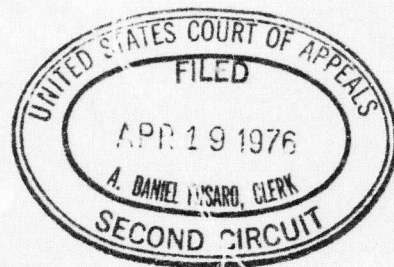
CHARLES LONG, PASQUALE DE ROSA, ALBERT ZAPPY, HARRY
EDWARDS and ANTHONY DEL GAIS, each of them indi-
vidually and on behalf of all other persons, members
of Local 1974 working or seeking work as drywall
tapers within the jurisdiction of such labor organi-
zation, similarly situated,

Appellees,

against

OPERATIVE PLASTERERS' AND CEMENT MASONS' INTERNATIONAL
ASSOCIATION OF THE UNITED STATES AND CANADA, OPERA-
TIVE PLASTERERS LOCAL 60, OPERATIVE PLASTERERS LOCAL
202, and OPERATIVE PLASTERERS LOCAL 852,

Appellants.



APPELLEES' BRIEF

BURTON H. HALL
Attorney for Plaintiffs-Appellees
401 Broadway
New York, N.Y. 10013
(212) 431-9114

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DRYWALL TAPERS AND POINTERS OF GREATER
NEW YORK, LOCAL 1974,

-and-

CHARLES LONG, PASQUALE DE ROSA, ALBERT ZAPPY,
HARRY EDWARDS and ANTHONY DEL GAIS, each of
them individually and on behalf of all other
persons, members of Local 1974 working or
seeking work as drywall tapers within the
jurisdiction of such labor organization,
similarly situated,

76-7108

Appellees,

-against-

OPERATIVE PLASTERERS' AND CEMENT MASONS' INTER-
NATIONAL ASSOCIATION OF THE UNITED STATES AND
CANADA, OPERATIVE PLASTERERS LOCAL 60, OPERA-
TIVE PLASTERERS LOCAL 202, and OPERATIVE
PLASTERERS LOCAL 852,

Appellants.

APPELLEES' BRIEF

Statement

This action was brought on August 29, 1975 by
Appellees, a local labor organization and its members, to
protect their economic interests against a sudden invasion of
their jurisdiction by defendant-appellant Plasterers' Unions.
The invasion of their jurisdiction had begun on or about March
20, 1975; Appellees had promptly thereafter, and repeatedly,

sought protection by utilizing such remedies as were available to them within the Building and Construction Trades Department of the AFL-CIO, and by attempting through mediation and conciliation to secure recognition of their rights. But they could not secure a remedy; instead, defendants-appellants, the Plasterers' international union (or OPCMIA) and its three New York City local unions, have stepped up the pace of their invasion, sending their members onto more and more jobsites where drywall taping and pointing work is being performed, to take the work away from members of plaintiff-appellee, Drywall Tapers and Pointers Local 1974.

Both labor organizations -- Local 1974 and Plasterers -- are bound by a jurisdictional agreement, entitled a "Memorandum of Understanding," that was entered into on November 29, 1961 by three international unions: by Plasterers (i.e., OPCMIA), by Painters and by Bricklayers. The agreement assigned certain types of work to each of the different internationals, thereby determining the separate work assignment jurisdictions of each. As regards drywall taping and pointing work (i.e., the filling or cementing of the joints or seams between drywall "sheetrock"), the agreement provides as follows, in Section F (J.A. 191a) ^{*}:

"All pointing and taping of drywall, regardless of material used, is Painters' work, providing the drywall surfaces are not to receive plaster, acoustical

^{*} The initials "J.A." refer to the Joint Appendix. Page references to the Joint Appendix for each of the facts summarized above, will be found under Point I, infra, on pages _____ of this brief.

or imitation acoustical finishes."

The agreement of November 29, 1961, by its terms, supersedes all previous jurisdictional agreements between the three unions (J.A. 187a). Of especial importance here, it supersedes in particular a certain "Decision of Record" of May 19, 1947, by which a different jurisdictional boundary, governing drywall taping work, had been drawn between Plasterers and Painters (J.A. 196a). As noted infra, the Plasterers have conceded on deposition that the agreement is binding on all their subordinate bodies. And the jurisdictional determinations of the Impartial Jurisdictional Disputes Board of the AFL-CIO's Building and Construction Trades Department establish that the November 29, 1961 agreement does in fact establish Painters' right to all drywall pointing and tapint work, regardless of material used, on drywall surfaces that are not to receive either plaster finish, or acoustical finish, or imitation acoustical finish (J.A. 194a-212a).

In 1970, Painters chartered Drywall Tapers Local 1974 and assigned to it all jurisdiction over drywall taping and pointing in New York City and in certain parts of Nassau County (J.A. 9a).

Plasterers complied with the November 29, 1961 agreement until August 1, 1974. As indicated infra, on depositions conducted pursuant to Rule 30(b)(6), FRCP, on April 12, 1976, each of the three local union defendants-appellants testified that none of their members had performed any drywall taping work during the

period from November 29, 1961 to August 1, 1974.

On August 1, 1974, Drywall Tapers' Local 1974's collective bargaining agreement expired and the local went on strike; the strike continued until October 7, 1974 (J.A.11a, 15a). During August and September 1974, in the middle of the strike, Plasterers sent their members through Local 1974's picket lines to perform struck work: drywall taping and pointing work that Local 1974's members had been performing until August 1, 1974. (J.A. 12a-14a). At the conclusion of the strike, however, Plasterers' members were withdrawn and the work was turned back to Local 1974's members (J.A. 15a).

But in March 1975 the series of invasions that are here complained of began. Local 1974's collective bargaining agreement permits it to stop the jobs of any employer who is more than two weeks delinquent in paying to the welfare funds the fringe benefit contributions due. In accordance with that provision, Local 1974 stopped the jobs of one employer on March 18, 1975 (J.A. 15a-16a). While the stoppage was in effect, on March 20, 1975, Plasterers sent their members onto one of the jobs to perform drywall taping work; in order to circumvent responsibility, the employer subcontracted the work to a plastering contractor, who employed members of Plasterers (J.A. 16a). Later, and especially in June, July and August, 1975, other employers turned drywall taping work on other jobsites over to Plasterers, and Plasterers sent their members to perform the work (J.A.17a-18a).

Local 1974 sought relief through inter-union dispute settlement machinery, as noted earlier and discussed infra. But

it was unable to secure recognition of its rights under the November 29, 1961 agreement, and was unable to secure a determination from any dispute-settlement body concerning its claims under that agreement. After exhausting all avenues available to it, it brought suit, and motion for preliminary injunction in the court below.

Appellees' motion for preliminary injunction was noticed for September 8, 1975. Plasterers, by a series of four separate law firms, appeared below and made ex parte requests for adjournment, and were in part successful. As Appellants note in their brief (page 22), in order to stave off further ex parte adjournments, Appellees stipulated to an adjournment to September 17, 1975 for Plasterers' response. Plasterers served and filed voluminous papers, both in response to the motion and in support of a cross-motion to dismiss; the papers, only selected portions of which are reprinted in the Joint Appendix, included several pounds of exhibits annexed to the affidavits of James J. Boyle, Michael Canuso, and H. Earl Fullilo, that were submitted by Plasterers. The battle of affidavits was joined, and Appellees responded with a reply affidavit of James J. Shay. The matter went to oral argument on October 3, 1975, and on November 5, 1975, the Court below handed down an Opinion (J.A. 300a-308a).

The Court below, in its November 5, 1975 Opinion, pointed to a possible further remedy available: an opportunity for review by a Hearings Panel of the Joint Administrative Committee of the Building and Construction Trades Department (J.A. 308a). It there-

fore ordered both Local 1974 (through its international) and Plasterers to petition the Joint Administrative Committee for immediate referral to a Hearings Panel of the question of the present applicability of the November 29, 1961 agreement.

Local 1974 did so although, as Plasterers note in their brief, it was necessary for it to bring suit against its international (Painters) in order to do so (Appellants' brief, page 14).

Plasterers failed to petition. In January, 1976, Appellees renewed their motion and, after a further battle of affidavits, the Court below handed down a second Opinion, finding that there was now a clear exhaustion of remedies, finding also that Appellees were likely to prevail on the merits, and directing issuance of a preliminary injunction (J.A. 371a-376a). The Court below, after considering orders settled by both sides, entered an Order of preliminary injunction (J.A. 378a-380a), from which Appellants appeal.

Plasterers asked and obtained a stay to permit motion for further stay in this Court. They then moved this Court for a stay pending appeal. In their motion, and in affidavits submitted to this Court, they told the Court that "exactly" 213 persons, members of Plasterers, were then working as drywall tapers in New York City, and that to allow the Order to go into effect would therefore disrupt the lives of this large number of persons. In response, Local 1974 conducted an examination of those jobsites on which drywall taping work had been assigned to Plasterers and discovered that Plasterers' figures were grossly inflated: Local 1974 reported to this Court, giving the name and location of each jobsite, the name of each employer, and the number of persons per-

forming drywall taping work on each, that the total number of persons performing such work on jobsites at which such work was assigned to Plasterers amounted to only 16 persons. Local 1974 in the affidavits submitted, and on oral argument, challenged Plasterers to name a jobsite other than those listed, or to refute its figures; Plasterers failed to do so.

The Plasterers obtained their stay; it is reasonable to believe that it was obtained on the basis of the figure of 213 persons who would have to be removed from their jobs if the stay were not granted. Since then, Local 1974 has taken depositions of each of defendants by their officers, and the depositions reveal that, indeed, Plasterers had grossly exaggerated the number of members working.

Attached to Plasterers' reply memorandum, on their motion in this Court for a stay, is an affidavit of James J. Boyle, sworn to March 22, 1976; that affidavit states in paragraph 6 as follows:

"Pursuant to a specific request made by the General President of the OP&CMIA, representatives of the Defendants-Appellants Locals 60, 202 and 852 have determined exactly the number of employees who are presently working for contractors in the Metropolitan New York area doing drywall pointing and taping work using plaster material. By checking health and welfare records which show the names of employees on whose behalf contributions are being made by specifically-named employers for each hour of work performed and comparing such records with their personal knowledge of the type of work being performed by said employees on the various jobsites, representatives of Locals 60, 202 and 852 have determined and have reported to the affiant that 213 persons are presently performing drywall pointing and taping work using plaster material in the Metropolitan New York area. Of this number, 115 persons are working for members of the Metropolitan New York Drywall Contractors Association,

Inc. The other 98 are employed by plastering contractors which have no collective bargaining agreements with Local 1974." (Emphasis added.)

Following the granting of the stay, Appellees noticed each of the defendants for deposition; after a week's adjournment (at Plasterers' request) and Plasterers' unsuccessful motion to stay the taking of the depositions, they were held on April 12, 1976.

Mr. Boyle testified for OP&CMIA itself (the international). He testified that he had telephoned Mr. Canuso of Local 852, Mr. Euvino of Local 60 and Mr. Marotta of Local 202 and had noted down the figures that they had given him; that is how he arrived at the figure of 213 given in his affidavit (pages 6-8). Asked to produce his calculations, he said "I imagine it's been thrown away."

Fortunately, Mr. Canuso, Mr. Euvino and Mr. Marotta testified on the depositions of their respective locals. Mr. Canuso and Mr. Euvino testified that no members of their two locals -- Locals 852 and 60 -- had performed any drywall taping or pointing work in 1976. As to all the jobs which they had been sent onto in 1974, the members had either been removed from the jobs or the jobs had been completed before the end of 1975 (cf. Canuso deposition, pages 16-18, Euvino deposition, pages 9-18). None of the members of either local were performing drywall taping or pointing work at the time of the deposition (Canuso, pages 16-18, Euvino, pages 17-18).

Mr. Canuso's local has, as its jurisdiction, parts of Queens and Nassau County; Mr. Euvino's, the largest of the three locals (with about a thousand members), takes in Manhattan and the Bronx. It is apparent that any honest figures regarding the number

of members doing drywall taping work that Mr. Boyle could have elicited from those two local unions would have added up to zero.

The exception is Mr. Marotta's local, Local 202, which takes in Brooklyn, parts of Queens, and parts of Nassau County; it has about 500 members, or half as many as Local 60. Mr. Marotta began his testimony by saying that "Close to two hundred" of his members were presently doing drywall taping work, and only five were doing ordinary plastering (page 11); he also submitted what purported to be weekly payroll reports, by various employers, to Local 202's pension funds. But it transpired that most of the jobs that he referred to had been completed, at various times from October (or earlier) of 1975 to March 1976, and only three employers were now employing members of Local 202 to perform drywall taping or pointing work:

(a) Lamparter Ornamental was employing about eight persons on a job at Kingsboro Community College (pages 30, 63-4);

(b) A & M Wallboard was employing an uncertain number ("About fourteen. It might be eight...") on the same job at Kingsboro Community College (pages 46, 63); and

(c) Prince Carpentry was employing some 45 men, most of them (about 35) working on a job in New Jersey that had commenced only a week before (pages 52-53), the rest at various jobs in Brooklyn.

Including the New Jersey job, which accounts for more than half the total, Mr. Marotta's total number of members performing drywall taping or pointing work adds up, therefore -- according to his own testimony -- to between 61 and 67 persons, the greater part of whom (the 35 working

in New Jersey) could not have been working on that job at the time that Mr. Boyle's affidavit was sworn to and submitted to the Court. (It is possible, of course, that some other jobs, since completed, were being performed on March 22, 1976, or whenever Mr. Boyle made his telephone calls -- but the numbers working on those jobs, even according to Mr. Marotta's figures, could not have equalled the number now working (according to Mr. Marotta) on Prince Carpentry's New Jersey job.)

(It should be noted, also, that in the week of March 15, 1976, Local 1974 conducted an investigation of the jobsites in New York City where drywall taping work had been assigned to members of Plasterers. At the Kingsboro Community College, it found a total of 3 persons performing drywall taping work -- as opposed to the total of 16 to 22 which Mr. Marotta ascribes to the two contractors performing the job. At six jobsites run by Prince Carpentry Company, which include all those mentioned by Mr. Marotta except for the one in New Jersey, they found a total of nine persons performing drywall taping -- a figure not far removed from Mr. Marotta's figure of ten. See: affidavit of John Alfarone, sworn to March 17, 1976, and submitted to this Court in opposition to Plasterers' motion for a stay.)

In short, it is apparent that the figure of 213 members of Plasterers (or 213 persons for whom contributions are being paid to Plasterers' funds) working at drywall taping in Metropolitan New York -- the figure that Mr. Boyle submitted to this Court, under oath, on Plasterers' motion for a stay -- was and is grossly exaggerated.

It was not and is not truthful; it can only have been prepared for purposes of deceiving the Court. The same comment applies to the rest of what Mr. Boyle stated in the paragraph from his affidavit quoted supra, at pages 7 to 9. It is now obvious that the numbers of Plasterers performing drywall taping work were never "determined exactly" by the rigorous methods Mr. Boyle describes. It is likewise obvious that Mr. Boyle could not have added up figures reported to him by the various locals -- because for two out of three locals, the figures were zero. Whatever figures he did receive by telephone all must have come from Mr. Marotta of Local 202.

Appellees suggest to the Court, therefore, that the stay obtained in this Court was obtained by Plasterers by means of false representations to this Court. It should not be extended.

Appellees further suggest that the Order of the Court below should be affirmed summarily. The Court below had before it undisputed facts sufficient to determine Appellees' entitlement to a preliminary injunction. Plainly, the Court below gave careful attention to all the facts, including all the documentary exhibits submitted. Plasterers at no time requested an evidentiary hearing and, since the facts were undisputed, there was never any need for such a hearing. Moreover, the key issue -- the viability and meaning of the November 29, 1961 agreement -- was not the kind of issue that could be illuminated by live testimony. There is no basis whatever for the suggestion that the Court abused its discretion by granting preliminary injunctive relief.

POINT I.

ON THE UNDISPUTED FACTS, APPELLEES WERE
AND ARE ENTITLED TO PRELIMINARY INJUNC-
TIVE RELIEF.

1. The Undisputed Facts.

The facts set forth in the Verified Complaint (J.A. 6a-23a), in the affidavits of John Alfarone (J.A. 28a-38a, 368a-369a) and in the affidavits of James Shay (J.A. 169a-263a, 321a-327a) are not disputed in any way material to this appeal, or to the issue of the granting of the preliminary injunction. Those affidavits, and the Verified Complaint, establish that:

(i) On November 29, 1961, three international unions -- Plasterers, Painters and Bricklayers -- entered into a certain agreement, entitled a "Memorandum of Understanding," that is and remains binding upon the subordinate bodies of each as well as upon each international itself (J.A. 10a, 11a, 171a, 186a-192a)*;

* On April 12, 1976, defendant OPCMIA (the international) was deposed by its general vice president James J. Boyle, who is its officer in charge of jurisdiction. In regard to the above, Mr. Boyle testified as follows (pages 12 and 13):

Q By the way, this agreement /the 1961 Memorandum of Understanding/ was entered into by the Operative Plasterers Union, wasn't it?

A Yes.

Q It's never been repudiated at least not by the Operative Plasterers'; is that correct?

A No.

Q Operative Plasterers' entered into an agreement on behalf of all of its subordinate bodies, is that correct?

A As International, yes.

(ii) The agreement by its terms supersedes all previous agreements between the parties relating to jurisdiction (J.A. 29a, 171a, 187a);

(iii) The Impartial Jurisdictional Disputes Board of the AFL-CIO Building and Construction Trades Department has recognized that the agreement supersedes prior jurisdictional agreements and, in particular, that it supersedes the "Decision of Record" of May 19, 1947, upon which Plasterers chiefly rely (J.A. 196a);

(iv) The agreement by its terms provides that all drywall taping and pointing work belongs to Painters, regardless of material used, providing the drywall surfaces are not to receive plaster finish, or acoustical finish, or imitation acoustical finish (J.A. 10a, 29a, 191a);*

* At their deposition on April 12, 1976, the three defendant local unions testified by their representatives that, between November 29, 1961 and August 1, 1974, their members had not performed any drywall taping or pointing work at all.

Specifically, Local 60, by Louis Euvino, testified as follows:

Q Prior to August of 1974, to your knowledge, have any members of Local 60 ever performed any work involving the cementing or finishing of the joints in between the drywall and sheet rock?

A Not to my knowledge (page 6)

Local 202, by Carmine Marotta, testified as follows:

Q Prior to that two month period in 1974, to your knowledge, had members of your Local or had members of your Local ever performed drywall finishing work or the finishing of joints in drywall surfaces?

A Prior to when?

Q Prior to August of 1974?

A They never had. I don't think so.

Local 852, by Michael Canuso, testified that its members had performed one job 1937-38, and another in 1945; he further testified:

Q ... were there any other times between November 29, 1961 and August 1, 1974 at which members of Local 852 performed drywall finishing or taping work?

A No, it wasn't for a reason. It wasn't around to do that.

(v) The Disputes Board has consistently based its jurisdictional determinations relating to drywall taping upon the 1961 agreement (J.A. 194a-212a);

(vi) On or about December 11, 1973, the Disputes Board was directed by its governing body to "defer action" on future grievances concerning drywall taping (J.A. 214a-215a), and as a result has been barred from consideration of claims under it (J.A. 223a, 224a);

(vii) Despite the "defer action" directive, the three international unions continued to be bound by the agreement and continued to settle their jurisdictional disputes on the basis of its terms (J.A. 174a-175a, 227a, 231a);

(viii) During August and September 1974, when Local 1974 was engaged in an economic strike, Plasterers caused their members to perform struck drywall taping and pointing work that, under the agreement, was Painters' work (J.A. 11a-15a, 30a);

(ix) Upon the conclusion of the strike, Plasterers' members were removed from the drywall taping work and replaced by members of Local 1974 (J.A. 15a, 30a);

(x) Commencing March 20, 1975, and at various times thereafter, Plasterers caused their members to go onto drywall construction sites to perform drywall taping work that according to the 1961 agreement was Painters' work (J.A. 16a-18a, 31a-32a)*

* At their depositions on April 12, 1976, the three defendant locals, by their representatives testified that, in the period since March 10, 1975, at least some members of each had been sent onto jobsites to perform, and/or had performed, drywall taping work. Locals 60 and 852 testified that none of their members were presently performing such work; but Local 202, by Carmine Marotta, gave various numbers, all substantial (his first answer was "Close to two hundred" (page 11)), presently performing such work.

(xi) Since January 1970, Local 1974 has been a local labor organization chartered by Painters and assigned by Painters jurisdiction over all drywall taping and pointing work in New York City and certain parts of Nassau County (J.A.9a);

(xii) before instituting this suit, Local 1974 attempted to negotiate with Plasterers, and, through Painters, with OPCMIA, attempted to exercise the mediation and dispute settlement procedures available locally, and appealed to the Disputes Board; but its efforts have been unsuccessful and the Disputes Board has refused to hear its appeal or consider the dispute (J.A. 32a-37a, 175a-181a, 233a-258a);

(xiii) Plasterers have continued to send their members onto jobsites to perform drywall taping and pointing work that, under the 1961 agreement, is Painters' work (J.A. 317a-318a); and

(xliv) As a result, members of Local 1974 have been denied employment and suffered loss of employment opportunities (J.A. 19a); employer contributions to Local 1974's welfare funds have been cut off in regard to those jobs taken over by Plasterers (J.A.19a); the wage scales and working conditions of drywall tapers, members of Local 1974, have been undercut by the lower wages and poorer working conditions accepted by Plasterers (J.A. 30a-31a); and because of the threat of further incursions, Local 1974 has been weakened as a labor organization and in its ability to protect its members' interests (J.A. 15a-16a, 19a, 38a, 369a).

The above chain of facts was not materially disputed below, nor is it now. The answers of Plasterers at their depositions of April 21, 1976 are given in footnotes above (in footnotes, to separate them from the material that was before the Court on the motion for preliminary injunction) to indicate that there is no genuine dispute as to those facts even now. Reduced to its essentials, the above chain of undisputed facts establishes:

(a) that Plasterers are parties to an agreement with Painters, of which Local 1974 is a significant party beneficiary;

(b) Plasterers have violated that agreement and threaten to continue to violate it; and

(c) Local 1974 and its members have suffered and will continue to suffer grievous and material damage in consequence unless injunctive relief is granted, and the damage is of a kind or type that is not reparable in damages.

Of the three ultimate facts here listed, Plasterers disputed only the first, that labeled (a), in the Court below. They did not deny the agreement itself; they denied that it was still in effect, or that it was "recognized." As to (b) and (c), these were never challenged below, not even as ultimate facts. Hence there never was need to go into them deeply, or even to make specific findings concerning them. The only defense on the merits that Plasterers have offered is their challenge, discussed by the Court below at J.A. 304a, to the viability of the agreement.

Plasterers' defenses will be examined below. First we

turn to the irreparable nature of the damage and injury admittedly suffered by Local 1974 and its members.

2. The Irreparability of Appellees' Damage.

Plasterers admit having taken drywall taping work, defined as Painters' work by the terms of the 1961 agreement, from Local 1974. the parties have recognized that the damage suffered by Local 1974 is necessarily irreparable in damages. It was therefore not an issue below. But Plasterers have made it an issue on appeal.

The loss of jobs itself, and the concomitant loss by Local 1974's members, who are participants in Local 1974's welfare funds, of employer-contributions to those funds, are obvious. Theoretically, these could be measured in money damages. In fact, however, measuring them in money damages -- and apportioning any judgment for lost wages -- would be an impossibility. Even if it could be done it would be inadequate, for Local 1974's members want to work at their trade, insofar as such work is available, not live off anticipated awards of back wages. Compare: Semmes Motors, Inc., v. Ford Moter Co., 429 F.2d 1197, 1205 (2nd Cir. 1970).

More serious is the undermining of Local 1974's established wage scale and established work standards by the low-wage and low "labor cost" competition of Plasterers, and the weakening of Local 1974's ability to defend its members' interests.

Local 1974 has a high wage scale and maintains good working conditions. In particular, it maintains safety standards that are of profound value to its approximately 1000 members. Its collective bargaining agreement forbids the use of "stilts" -- metal

contraptions that an employee, before Local 1974 came into existence (in 1970), was required to strap onto his legs to enable him to reach high areas on a wall without erection of a platform. Stilts, under New York State's regulation of industrial safety conditions (prior to enactment of the federal Occupational Safety and Health Act) were outlawed as a serious safety hazard -- but their effective outlawry in drywall taping was accomplished only by Local 1974. Similarly, Local 1974's agreement prohibits the mixing of powdered mixtures unless safety masks, approved both by OSHA and by Local 1974, are provided by the employer; and prohibits the use of any powdered mixture unless approval has been given by OSHA or Mount Sinai School for Experimental Research; these provisions aim at protecting drywall tapers from asbestosis and asbestos poisoning.

By contrast, Plasterers allow far lower wages and allow the employers to compel employees to wear stilts, to use powdered (and other) mixtures without limitation, and do not require the provision or wearing of safety masks. (J.A. 30a-31a).

The undercutting by Plasterers of Local 1974's wage scale and its safety conditions has a great monetary value. That monetary value was emphasized to this Court by the employers' association, Metropolitan New York Drywall Contractors' Association, in its application to intervene on appeal as a party defendant. On the Association's behalf, Arnold Koslow, the Chairman of its negotiating committee, submitted to this Court an affidavit, sworn to the 16th day of March, 1976, complaining that several employer members had

based their hopes upon what he referred to as "labor costs in the collective bargaining agreement with the Plasterers Union."

(Para. 6, page 3 of his affidavit.) His affidavit continues:

"The labor costs which will be incurred if the the employers are required to employ members of the Tapers Union are substantially higher. If these employers are required to employ tapers rather than plasterers they will suffer serious economic losses on these jobs."

Local 1974 is not the only plaintiff below, nor the only appellee here. Five of its members are also plaintiffs-appellees, in their individual capacity and on behalf of the class of persons, members of Local 1974, working or seeking work as drywall tapers in New York City. It is they who must pay the price of the low "labor costs" that Mr. Koslow speaks of in his affidavit. The price they pay cannot be reduced to monetary terms. Their damage, like Local 1974's, is irreparable.

A companion element of damage -- both to Local 1974 and its members -- is the weakening of Local 1974 in its ordinary, day-to-day "business" of defending and protecting its members' interests. If Local 1974 takes aggressive action to defend its members, it is confronted with the danger that the employer may assign his work to Plasterers and thereby escape Local 1974 altogether. So it is necessarily inhibited from giving its members the effective representation they deserve. That is how the troubles complained of began: In March 1975, Local 1974 stopped the jobs (as its collective bargaining agreement permitted it to do) of an employer who was delinquent in paying fringe benefit contributions to its welfare

funds; two days later the employer sub-contracted the drywall taping work to a plastering contractor who assigned the work to Plasterers -- and Plasterers continued in the job until it was completed late in 1975. (J.A. 15a-16a). And the same is threatened whenever Local 1974 makes demand upon an employer to comply with his obligations under the collective bargaining agreement (J.A.318a).

In short, the damage that Local 1974 and its members suffer and are threatened with is of a nature that makes it irreparable. There is no money price that one can put on the value to a construction worker of vigorous representation on the part of his labor union. And there is no money price that one can put on the value of his safety standards and working conditions. Nor can one put a money value upon acts which undermine and weaken his union's representation and his safety and working conditions. These damages are not reparable in money figures. And their irreparability was never challenged by Plasterers until argument began in connection with this appeal.

3. Appellants' Defenses: Abrogation.

Plasterers argued below (Boyle affid., 52a, 11a-112a) and argue here (pp.19-20, Appellants' brief) that the 1961 agreement was "abrogated" in January 1972, by a letter written by Painters' General President to the General President of Plasterers. They have not produced the letter or any copy of it. Nor is it clear that any letter such as they assert was ever sent to or received by Plasterers' General President, or by anybody else.

All that they base their argument on is a page from Painters' official journal for April 1972, containing purported minutes of Painters' General Executive Board. In those minutes, Painters' General President reports that he had "directed" three letters to various people, in one of which he said that he had expressed the opinion that Plasterers had abrogated the 1961 agreement. In the other two letters, so he reports, he indicated a desire to process disputes under the agreement more closely in line with the procedures called for by the agreement (J.A. 112a). The minutes do not reflect which of the three letters, if any, was sent to Plasterers. And there is no evidence that any of them ever were sent to anybody at all.

But the easiest answer to Plasterers' "abrogation" argument is to point to the date of the supposed "abrogation." If it occurred at all, it occurred in January 1972. And it is clear that the 1961 agreement remained viable and enforceable -- and, in fact, was enforced, throughout 1973. If, then, Plasterers maintain that it was "abrogated" (or repudiated by Painters) in January 1972, how do they explain the decisions of the Impartial Jurisdictional Disputes Board handed down from August 24, 1973 to November 2, 1973, which plainly uphold the viability of the 1961 agreement and enforce its terms (J.A. 194a-212a)?

Plainly, any "abrogation" of the 1961 agreement that is supposed to have taken place in January 1972 was ineffective. It is at least prima facie apparent that the 1961 agreement remains viable; compare: Herbert Rosenthal Jewelry Corp. v. Grossbardt,

428 F.2d 551, 553-554 (2nd Cir. 1970), where this Court found prima facie evidence of the viability of the copyright sued on, sufficient to support issuance of the preliminary injunction, despite similar claims by defendant.

4. Appellants' Defenses: Non-Exhaustion of Remedies.

Before bringing suit, plaintiffs attempted to exercise the dispute-settlement provisions available to them under the agreement itself and under the machinery of the AFL-CIO Building and Construction Trades Department. The Court below, in its second Opinion (of March 5, 1976), found that there was "a clear exhaustion of remedy" (J.A. 374a).

Mediation efforts were and have been stymied by Plasterers' failure and refusal to state their position candidly as to the 1961 agreement (Fullilove affid., J.A. 165a-166a, and minutes, J.A. 248a); and secondarily by Plasterers' refusal to cooperate in joint submission of the materials for analysis (minutes, J.A. 242a). Indeed, the last effort at mediation -- that of August 29, 1975 -- ended with the determination that no action would be taken until Plasterers provided official correspondence regarding their position on the 1961 agreement (J.A. 248a). Plasterers have never provided this correspondence, although they have been repeatedly reminded of their duty to do so (including oral argument in this Court on their motion for stay).

Drywall Tapers Local 1974 sought a determination from the Building Trades Employers Association (or BTEA), pursuant to local dispute-settlement procedures, but BTEA refused to consider

the issue of the 1961 agreement. Although Local 1974 had pressed this issue both at mediation and in seeking BTEA's arbitration (Fullilove affid. J.A. 166a; Fullilove testimony, 253a-254a), the BTEA refused to consider the issue, regarding it as not before the body (Fullilove testimony, 252a, 254a-256a). Fullilove was chairman of the arbitral body. Later, in August 1974, he testified at another arbitration proceeding, and was questioned as to what had transpired at the earlier one. Section F of the 1961 agreement was read to him (J.A. 255a) and the following testimony elicited from him (J.A. 252-256a):

Q ... Your BTEA Board did not have before it that question or decide on that question; is that right?

A That's right.

Instead of deciding Local 1974's claim under the 1961 agreement, the BTEA ruled only upon the type of material being used. It found the material to be a "plaster material" rather than an "adhesive material" and hence, according to a jurisdictional "Decision of Record" of May 19, 1947 (J.A. 243a) belonged to Plasterers (J.A. 88a)*. The logical difficulty with that holding is that the "Decision of Record" was explicitly superseded by the 1961 agreement (J.A. 187a) and the Disputes Board has explicitly so found (J.A. 196a).

Local 1974 attempted to appeal, pursuant to the Plan for settlement of disputes of the Building and Construction Trades Department, to the Disputes Board and the Disputes Board accepted its appeal (J.A. 90a). But thereafter the Disputes Board refused

* The BTEA's decision was vacated by decision of the New York State Supreme Court of March 9, 1976.

after extended delays to hear the appeal (J.A. 103a-104a).

Appellants' challenge is directed to that refusal of the Disputes Board. They say that Local 1974 provoked it, by pressing a grievance arbitration against an employer. Local 1974 had filed the grievance in question and sought arbitration of it in March and April 1975, long before the mediation and conciliation procedures of BTEA had been exercised. Local 1974 had argued that the employer had violated its collective bargaining agreement by sub-letting taping work undertaken by it to another employer; Local 1974 did not seek in that arbitration any ruling as to whether the work was ultimately performed by the other employer was or was not within its jurisdiction, hence there was and is no merit in Plasterers' argument that Local 1974 was seeking to obtain a jurisdictional determination from the arbitrator. And both the Painters' Union (J.A. 260a-262a) and the Arbitrator himself (J.A. 363a) have upheld the propriety of Local 1974's proceeding with the arbitration.

Moreover, as the Court below noted (J.A. 374a-375a), if the Disputes Board had heard the appeal it would not have dealt with the issue that is material here, the 1961 agreement. For two reasons: first, because that issue was never dealt with by the BTEA, from whose decision appeal was taken; and second, because the "defer action" directive, being still in effect, barred the Disputes Board from hearing the issue of the 1961 agreement (J.A. 223a. 225a).

After this action was instituted and first heard by the

Court below, the Court ordered and directed both parties to petition to the Building and Construction Trades Department's Joint Administrative Committee ~~for~~ immediate referral, under the Department's Plan, of the issue of the present applicability of the 1961 agreement to the Hearings Panel. The Court's language was clear and direct (J.A. 308a):

"Accordingly, the court orders both Local 1974 through its international and Plasterers to petition the Joint Administrative Committee for immediate referral to the Hearings Panel."

It is this language which Plasterers contend they did not understand (Appellants' brief, page 14). They thought, say they, that they were only ordered to "cooperate" with any request made by Local 1974. That explanation not only defies belief on its face; it is contradicted also by the facts:

(a) In January 1976, approximately a week before Appellees renewed their motion for preliminary injunction, counsel for appellees spoke by telephone with one of the counsel (Roger Levin, Esq.) for appellants and advised him that Painters had made the petition on behalf of Local 1974; in response to a query whether Plasterers had done the same, Mr. Levin replied that they had not and would not, since they anticipated an adverse decision from the Hearings Panel;

(b) On January 26, 1976, Appellees renewed their motion and, in their papers, stated that Painters had made petition on their behalf but Plasterers had failed to petition as ordered (J.A. 316a);

(c) The March 5, 1976 decision stressed Plasterers'

failure to make the petition as ordered (J.A. 373a).

In short, Plasterers were reminded at least three times of their obligation to carry out the Order of the Court below: once in mid-January 1976, once on January 26, 1976, and once on March 5, 1976. Yet Plasterers continued to fail and refuse to carry out the Court's Order. It was not until after the Order appealed from here was entered on March 12, 1976 that Plasterers finally got around to writing a letter to the Joint Administrative Committee as they had been ordered to do on November 5, 1975.

It was Plasterers, then, who refused to carry out the exercise and exhaustion of intra-union remedies, and who stymied Appellees' efforts in that direction by their non-cooperation. As the Court below found, following Local 1974's unsuccessful petition to the Joint Administrative Committee, there was a stalemate at the highest administrative level and a clear exhaustion by Appellees of their remedies.

5. Appellants' Defenses: The Scope of the Order Below.

The November 29, 1961 agreement, entered into by three internationals, is unlimited geographically: it extends to the entire geographical jurisdiction of the three international unions, namely United States and Canada. And as the decisions of the AFL-CIO Building and Construction Trades Departments' Impartial Jurisdictional Disputes Board indicate, it has been applied and treated as applicable throughout the AFL-CIO's jurisdiction, namely the United States (J.A. 194a-212a). It

would make no sense to enforce such an agreement geographically piecemeal; it was intended to be carried out "wheresoever" the jobsites may be located, and it should be so carried out.*

And Appellees' interest in a geographically unlimited Order is obvious. First, because Local 1974 cannot expect to preserve New York City, and part of Nassau County, as an "island" of Painters' jurisdiction over drywall taping if Plasterers are free to invade that jurisdiction everywhere outside that geographical jurisdiction. And second, because Local 1974's members -- who, as a class, are also plaintiffs in this case and Appellees before this Court -- have an obvious interest in the availability

* Plasterers, in their brief (page 36), cite the NLRB case of Painters and Drywall Finishers Local NO. 79 and O'Brien Plastering Co., 213 NLRB No. 106, 87 LRRM 1591 (1974) as indicating that the 1961 agreement has not been enforced throughout the United States. Their reliance upon it indicates that they have not read the decision carefully.

The case cited involves drywall taping work at the Mission Viejo school and three other locations in Denver, Colorado, performed by Richard O'Brien Plastering Company. The Mission Viejo school project is the one which was the subject of the Disputes Board proceeding in which the decision is reported as Exhibit "G" to the affidavit of James Shay, (J.A. 204a). And see also the Board's decision in regard to the Rodeway Convention Center project, performed by the same contractor (J.A. 202a).

As the NLRB noted in its decision, the NLRB normally gives attention to decisions of the Disputes Board (87 LRRM at 1595, 2nd col.). And under ordinary circumstances, the Disputes Board's decision would have been binding upon the employer. But in the Local 79 case, a hiatus in the collective bargaining agreements, though binding the employer to obey decisions of the Disputes Board's predecessor (the National Joint Board for Settlement of Jurisdictional Disputes) freed the employer from his obligation when the National Joint Board was discontinued and replaced by the Disputes Board. Hence, though the November 29, 1961 agreement was -- as the Disputes Board had already determined -- applicable to the Denver jobs, the employer was enabled to avoid its effect.

to members of Painters' local unions of drywall taping work.

Though the Plasterers' invasion of Painters' jurisdiction began in New York City -- i.e., within Local 1974's jurisdiction -- it has, beginning early in 1976, spread outside New York City. At his deposition on April 12, 1976, Carmine Marotta, Business Manager of Operative Plasterers Local 202 (situated in Brooklyn, New York) testified to the fact that his local union had, beginning in February and March 1976, sent its members onto two out-of-town jobsites, one in Spring Valley, Westchester County, New York, and the other in New Jersey, to perform drywall taping work (pages 49-63).

As to the Spring Valley job, Marotta testified (page 50) that members of his local union (though its jurisdiction is limited to Brooklyn, Queens and Nassau County), starting early in February 1976, commenced work on a jobsite in Spring Valley for Anton Plastering Company. The work involved drywall taping work: i.e., cementing of drywall seams or joints. Local 202's members worked there until the job was completed (or "about finished"); page 62. He indicated that some 16 members of Local 202 were so employed, or had in February been so employed.

Marotta testified that the New Jersey job began "About March" of 1976, or "Towards the end of March this year" (page 53). He testified that before the beginning of that job so far as he knew no members of any local union of the Operative Plasterers had ever performed drywall finishing work in the State of New Jersey (page 53) and that he did not know of any other jobs in

New Jersey which members of Plasterers were performing or have performed since the commencement of the job referred to (page 54).

Mr. Marotta testified that "about thirty-five" of Local 202's members were performing the job in New Jersey (page 53); they had been put on just the week before (page 52), or the first week in April 1976. Mr. Marotta could not keep track of how many were in New Jersey, as opposed to Brooklyn, because the employer's practice was to move men back and forth (page 60):

Q As to the list on this Prince Carpentry, you said most of them were working in New Jersey?

A They switch them up and back. I can't keep track of all of that. They send the men in working and that's it.

Q You are familiar with the jobs. How many men are working in New York City?

A In New York City, what do you mean New York City?

Q How many are working under the jurisdiction of Local 202?

A Local 202 as I told you takes them away and brings in some days ten the next day brings in fifteen

In short, were it not for the raiding of Local 1974 by Operative Plasterers Local 202, members of Local 1974 might be performing the work in New Jersey and in Spring Valley, as well as in New York City.

An effective remedy for defendants' violations of the November 29, 1961 agreement cannot be limited geographically to New York City. It must extend geographically as broadly as the agreement itself extends. For that reason the language of the Order below, applying to jobsites wheresoever located, was proper and appropriate, giving to plaintiffs relief that they are entitled to and that is necessary in order to prevent irreparable injury.

POINT II.

THE DISTRICT COURT DID NOT ABUSE ITS
DISCRETION BY GRANTING THE PRELIMINARY
INJUNCTION.

1. Primary Factors to be Considered: Likelihood of Success
and Irreparable Injury.

In determining whether preliminary injunctive relief was required in the instant case, the district court properly addressed itself primarily to two relevant factors: first, the appellees' likelihood of success on the merits; and second, the possibility that irreparable injury would result to appellees absent interlocutory relief. Cf. Brown v. Chote, 411 U.S. 452, 456, 36 L.Ed.2d 420, 424, 93 S.Ct. 1732, 1735 (1973); New York Path. & X-Ray Lab, Inc. v. Immigration & N.S., 523 F.2d 79, 81 (2nd Cir. 1975); 414 Theatre Corp. v. Murphy, 499 F.2d 1155, 1159 (2nd Cir. 1974); Herbert Rosenthal Jewelry Corp. v. Grossbart, 428 F.2d 551, 553 (2nd Cir. 1970).

As to the first of these primary factors, the district court made a clear and explicit finding on the basis of the undisputed and uncontested facts: it found that the agreement on which suit was based was viable and that it was likely that plaintiff (appellees) would prevail on the merits (J.A. 375a). As the Court's two opinions (J.A. 300a-308a, 371a-376a) establish, that finding is solidly supported by facts that are not disputed.

The second factor -- irreparable injury -- was undisputed below and, in fact, the very nature of the injury admittedly

threatened, is such as to ensure its irreparability. And Plasterers' arguments in this Court, on their motion for stay, testify to the materiality and irreparability of the loss of jobs and job opportunities caused and threatened by Plasterers' violation of the 1961 agreement.

Both of the two "primary" factors, therefore, are easily established from facts which were and are undisputed. That the 1961 agreement was entered into by Plasterers and was made binding upon all its locals; that by its terms it assigns drywall taping work to Painters; that Local 1974 has been assigned drywall taping work by Painters; that Plasterers have violated the agreement by causing their members to perform drywall taping work; and that as a result, members of Local 1974 have suffered loss of employment opportunities, their welfare funds have lost fringe benefit contributions, the wage scale and the work standards established by Local 1974 have been undermined, throughout the drywall taping industry, by the lower wage rates and poorer work standards permitted by Plasterers, and Local 1974 has been weakened in its ordinary trade union function of defending its members' interests -- all these facts are in substance admitted, and none are, or were below, genuinely disputed.

2. Secondary Factors: Balance of Hardship and Public Interest.

There are, of course, other important considerations to the granting or denial of preliminary injunctive relief. These include the balance of hardship between the parties and whether

the relief requested will affect the public interest. Although it is not necessary in every case that all four factors mentioned favor the granting of preliminary relief in order for the court to issue the injunction, all are relevant considerations; cf. New York Path. & X-Ray Lab, Inc. v. Immigration & N.S., supra, 523 F.2d at 81, footnote 4.

The balance of hardship plainly tilts toward Local 1974 -- because Local 1974 and its members, in the absence of preliminary injunctive relief, are suffering and will continue to suffer hardship in addition to the loss of jobs and employment opportunities.

As to the loss of jobs as such, it might be concluded that the damage which Local 1974 and its members suffer in the absence of injunctive relief is exactly equal to the damage that will be suffered by Plasterers and their members upon the granting or effectuation of the injunctive relief. There are only so many jobs available, and in a construction industry that for two years has experienced massive unemployment, loss of jobs or of job opportunities is a serious hardship. But one man's loss of a job may be equated with any other man's. It is a hardship either way. And the number of jobs taken by Plasterers from Drywall Tapers is equal to the number lost by Drywall Tapers to Plasterers.

But Local 1974 and its members suffer further an additional damage and hardship because of and by reason of Plasterers' continuing (and repeated) violation of the 1961 agreement, damage that they will continue to suffer until injunctive

relief is obtained and becomes effective. That additional damage has been described above: the undermining of Local 1974's wage scale and of its working conditions and safety standards by Plasterers' "sweetheart" dealings with the drywall employers, and by Plasterers' low "labor cost" competition in the drywall taping industry; the weakening of Local 1974 in its ordinary trade union function of defending its members' interests; the loss by drywall taping employees of the protection of their union, unhindered by threats of further incursions on the part of the Plasterers, and of their established wage scale and working standards.

The extent of the damage already suffered in these regards is impossible to assess in monetary terms and difficult to assess accurately even in the practical terms of estimating to what effect Local 1974 has been damaged in its ordinary "business" function as a labor union. Obviously, Local 1974 has not as yet been put out of "business" as a labor union by Plasterers' violations of the 1961 agreement; obviously also, if Local 1974 has no recourse, it will ultimately be put out of "business" or else forced, in its own defense, to offer low "labor cost" bargains to the employers in order to compete with Plasterers. Though the damage as yet is not total, it is already substantial -- and worse will be suffered unless injunctive relief becomes available.

No damage corresponding to this will, or even imaginably can, be suffered by Plasterers by the issuance of injunctive relief.

The public interest, and the policy of Congress, likewise favor granting, and effectuation, of the preliminary injunctive relief granted by the Court below. The enforcement of voluntary agreements between unions, such as the 1961 agreement between Plasterers, Painters and Bricklayers, establishing jurisdictional boundaries between them, is a key element in Congress's labor policy. It is expressed by Congress in Section 10(k) of the National Labor Relations Act and in Section 301(a) of the Labor-Management Relations Act of 1947, 29 U.S.C. 160(k) and 185(a) -- both of which were adopted by Congress as part of the same statute, the Taft-Hartley Act of 1947.

In Section 10(k), Congress placed key weight upon voluntary agreements between unions relating to the adjustment of work assignment disputes. As the Supreme Court has noted in Carey v. Westinghouse, 375 U.S. 261, 266, 11 L.Ed.2d 320, 325, 84 S.Ct. 401 (1964), "... § 10(k) not only tolerates but actively encourages voluntary settlements of work assignment controversies between unions...."

In Section 301(a), Congress gave federal district courts jurisdiction to enforce agreements between labor organizations. Peculiarly important to the national labor policy is enforcement of work assignment agreements between labor organizations; as this Court has noted, a ruling that federal courts lacked power to enforce them "would run counter to the position which Congress has accorded to voluntary adjustments." International Hod Carriers Local 33 v. Mason Tenders District Council, 291 F.2d 496, 504 (2nd Cir. 1960). And this Court added, ibid, at 505, that if it were to decide that

the District Court lacked jurisdiction to enforce such an agreement,

"... we think we would emasculate Section 301(a) and leave the parties to contracts between labor organizations wholly at the mercy of those who wish to repudiate their bargains without having any valid reason to do so. ... It is difficult for us to see how any such result, in the face of the plain language of Section 301(a), can be beneficial to labor."

To deny appellees the injunctive relief granted by the Court below would have precisely the same effect: leaving parties to a contract between labor organizations wholly to the mercy of those who wish to repudiate their bargains without having any valid reason to do so -- in this instance, to leave appellees wholly at the mercy of Plasterers -- would emasculate Section 301(a) and defeat the Congressional policy behind that section and behind Section 10(k): a Congressional policy actively encouraging such contracts.

3. Appellants' Procedural Objections.

As regards the procedure in the Court below, Appellants make three objections: first, that there was no evidentiary hearing (though none was requested); second, that the Court's findings are inadequate; third, that the Court, though granting preliminary relief, did not grant summary judgment.

First, as regards the holding of an evidentiary hearing.

Appellants themselves provide the short answer to this objection (at pages 20-22 of their brief) by quoting what this Court said in Semmes Motors, Inc. v. Ford Motor Co., 429 F.2d

1197, 1205 (2nd Cir. 1970):

"... [the defendant] joined the battle of affidavits with as much relish as the plaintiffs. A party who chooses to gamble on that procedure cannot be heard to complain of it when the decision is adverse."

The same holding was expressed by this Court in different words in S.E.C. v. Frank, 388 F.2d 486 (2nd Cir. 1968) at 493, fn. 6:

"... if a party is unwilling to have the issuance of a temporary injunction decided on affidavits, he must make his objection known; he may not gamble on the judge's accepting his affidavit rather than his adversary's and then seek a reversal if the result is disappointing."

That, of course, is precisely what appellants have done and are doing: they gambled on the judge's accepting their affidavits rather than plaintiffs'; now they seek a reversal, since the result of their gamble is disappointing to them.

But there is an additional reason why appellants' objection is misplaced. There was no need for an evidentiary hearing because the uncontested facts themselves plainly established appellees' entitlement to preliminary injunctive relief.

The facts have been gone into above, and are set out in detail in the two opinions of the Court below, the latter of which incorporates the former by reference (J.A. 375a). Plainly, they establish that the contract sued on is viable, that appellants have violated the contract, and that unless injunctive relief is granted appellees will suffer irreparable injury in consequence. Since these facts are undisputed, there was no need for an eviden-

tiary hearing. Cf. S.E.C. v. Koenig, 469 F.2d 198, 202 (2nd Cir. 1972); Herbert Rosenthal Jewelry Corp. v. Grossbardt, supra, 428 F.2d 551, 554-555 (2nd Cir. 1970); National Association of Letter Carriers v. Sombrotto, 449 F.2d 915, 921 (2nd Cir. 1971). And compare: S.E.C. v. Frank, supra, 388 F.2d at 490-491.

Second, as to the Court's findings.

Appellants complain that the Court's two opinions do not deal explicitly with the irreparable injury that Appellees' (undisputedly) are suffering, and that is (undisputedly) threatened in the absence of interlocutory relief. It would appear that they complain also (though this issue is better considered under the third heading, below) that the Court, though finding a probability of Appellees' success did not make a final determination. Their complaint suggests a misunderstanding of the question before a court on application for interlocutory relief, and of the function that findings are to serve.

The Advisory Committee's Note to the 1948 amendment to Rule 52(a), FRCP, states that "the judge need only make brief, definite, pertinent findings and conclusions upon the contested matters"; 5 F.R.D. at 471. And as Judge Yankwich has written, "It has ever been the law of pleading that where the facts are undisputed or are agreed or stipulated to, no findings are necessary." Yankwich, Findings in the Light of the Recent Amendments, 1948, 8 F.R.D. 271, 281. And see: Wright & Miller, Federal Practice and Procedure: Civil, Section 2579, at pages 711-712 of Vol. 9

(1971); and Moore, Federal Practice, Vol. 5A, Section 52.07, page 2733. Where there are no disputed facts, there need be no findings at all. As this Court, per Judge A.N. Hand, said in Douds v. Local 1250, Retail Wholesale Dep't Store Union, 170 F.2d 695 (2nd Cir. 1948),

"The absence of findings was not only a non-jurisdictional defect (see opinion of Clark, J., in Rossiter v. Vogel, 2 Cir., 148 F.2d 292), but findings were not requisite where no issue of fact existed. Fontes v. Porter, 9 Cir., 156 F.2d 956."

It is, of course, explicitly permitted by Rule 52(a) that findings and conclusions appear in an opinion or memorandum of decision. The Court below filed two Opinions, the latter of which incorporates the former (J.A. 375a) by reference. And proper findings and conclusions plainly appear therein.

It was not disputed in the Court below that Appellees (plaintiffs there) are suffering, and are threatened by, injury that by its nature is irreparable in damages; indeed that fact was obvious, since Appellants (defendants there) admitted that they had sent men onto jobsites to perform work that, under the 1961 agreement, was Appellees' work. There was accordingly no need for an explicit finding to that effect. The disputed questions concerned Appellants' challenges to the continued viability of the 1961 agreement and to Appellees' exhaustion of contractual remedies prior to instituting suit; and as to these, the Court below made extensive findings, definite and pertinent.

Appellants' secondary challenge to the findings (see: pages 20,26 of their brief) appears to be a protest against the

Court's use of the language of probability in its conclusion concerning the viability of the 1961 agreement (see: J.A. 375a). They fail to note the very definite factual findings (J.A. 374a) on which that conclusion is based. But their larger error is to fail to see the difference between findings and conclusions appropriate to decision on a motion for interlocutory relief, and those appropriate to a final judgment.

Third, as to the Court's non-granting of summary judgment.

As this Court, per Chief Judge Lumbard, has noted, the issues raised on a motion for preliminary injunction are distinct from those raised when permanent injunctive relief is sought. American Visuals Corp. v. Holland, 261 F.2d 652, 654 (2nd Cir. 1958); cf. Chappell & Co. v. Frankel, 367 F.2d 197, 203-204 (2nd Cir. 1966). And see: Brown v. Chote, 411 U.S. 451, 457, 36 L.Ed.2d 420, 424, 93 S.Ct.1732 (1973).

There is nothing inconsistent, therefore, in the granting of preliminary injunctive relief together with denial of the movant's application for summary judgment. Brown v. Chote, supra. As this Court said in Herbert Rosenthal Jewelry Corp. v. Grossbard, supra, 428 F.2d at 554,

"The defendants' contention that the simultaneous denial of plaintiff's cross-motion for summary judgment is inconsistent with the grant of the preliminary injunction is without merit. The court's acknowledgment that disputed issues of fact existed did not foreclose it from granting plaintiff's motion for preliminary relief. The issues on that application were distinct from those raised on the motion for summary judgment."

POINT III.

THE DISTRICT COURT HAD JURISDICTION TO
GRANT THE PRELIMINARY INJUNCTION.

Section 301(a) of the Labor-Management Relations Act of 1947, 29 U.S.C. §185(a), provides in relevant part:

"Suits for violation of contracts ... between any such labor organizations [representing employees in an industry affecting commerce], may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

It is established beyond question that, pursuant to that section, a district court has jurisdiction to grant injunctive relief enforcing a contract between labor unions. National Association of Letter Carriers v. Sombrotto, 449 F.2d 915, 918 (2nd Cir. 1971); Abrams v. Carrier Corp., 434 F.2d 1234, 1247-1248, (2nd Cir. 1970), cert. den., United Steel workers of America v. Abrams, 401 U.S. 1009 (1971); International Hod Carriers Local 33 v. Mason Tenders District Council, 291 F.2d 496, 501-505 (2nd Cir. 1960); Parks v. International Brotherhood of Electrical Workers, 314 F.2d 886, 914-917 (4th Cir. 1963), cert. den. 372 U.S. 976 (1973); Int'l Br'd of Firemen and Oilers v. Int'l Ass'n of Machinists, 338 F.2d 176, 179 (5th Cir. 1964); United Textile Workers v. Textile Workers Union, 258 F.2d 743 (7th Cir. 1958).

And cf. Retail Clerks v. Lion Dry Goods, 369 U.S. 17, 26, 7 L.Ed.2d 503, 509, 82 S.Ct. 541, 547 (1962), citing with approval United Textile Workers v. Textile Workers Union, supra.

As has been pointed out at pages 34 - 35 of this brief, supra, Congress's policy, as expressed in Section 301(a) and in Section 10(k) of the National Labor Relations Act, 29 U.S.C. 160(k), actively encourages voluntary agreements between labor unions establishing work assignment jurisdiction, and calls for their enforcement. And cf. Int'l Brotherhood of Firemen and Oilers v. Int'l Association of Machinists, supra, affirming Ibid, 234 F.Supp. 858 (N.D. Ga. 1964), in which a permanent injunction enforcing plaintiff's rights to assignment of certain work was granted on plaintiff's cross-motion (apparently without evidentiary or other hearing), after defendant had moved to dismiss.

Appellants argue, however, that enforcement of an agreement between labor organizations is either barred by the substantive provisions of Norris-LaGuardia (29 U.S.C. 104) or by its procedural provisions, in particular Section 7, 29 U.S.C. 107.

* By contrast to the case of a work-assignment claim, the desirability of giving blanket enforcement to agreements that relate solely to representation of employees (as opposed to assignment of work to employees) has been questioned; cf. Abrams v. Carrier Corp., supra, 434 F.2d at 1249; and see: Local #1547, Int'l Brotherhood of Electrical Workers v. Local #959, Int'l Brotherhood of Teamsters, 507 F.2d 872, 875-878 (9th Cir. 1974). But the ground on which it has been questioned concerns possible intrusion upon the National Labor Relations Board's jurisdiction to determine representation questions. That question has no bearing upon the issue of enforcement of work assignment agreements; compare: Int'l Hod Carriers Local 33 v. Mason Tenders District Council, supra. The significant difference between the two types of jurisdictional agreements and the bearing of the Labor-Management Relations Act upon them is explained in Carey v. Westinghouse, supra, 375 U.S. at 263-268, 11 L.Ed.2d at 323-326, 84 S.Ct. at 406.

Nothing in the Morris-LaGuardia Act supports their argument. None of the activity protected by Section 4 of the Act is sought to be enjoined. And there is nothing in the definition of a "labor dispute" in Section 13 of the Act to suggest that the such dispute is present here.* See: 29 U.S.C. 104, 113. Indeed, the inappositeness of the Act's procedures (cf. Section 7, 29 U.S.C. 107) testifies that they were intended to apply to a proceeding for enforcement of an agreement between unions concerning work jurisdiction.

An examination of Congress's declaration of public policy in Section 2 of the Act, 29 U.S.C. 102, further undercuts Appellants' argument. The Act's purpose was to protect employees, in their freedom of self-organization and their right to designate representatives of their own choosing, from "the interference, restraint or coercion of employers of labor, or their agents." And see: Boys Markets v. Retail Clerks Union, 398 U.S. 235, at 250-252, 26 L.Ed.2d 199, 210-211, 90 S.Ct. 1583 (1970). Surely the Act's sponsors would have been astonished had they been told that their bill would bar labor unions from entering into enforceable work jurisdiction agreements with each other, or would make the enforcement of such agreements difficult.

Plainly, enforcement of agreements voluntarily entered into between labor unions determining the respective work jurisdiction of each was not "a part and parcel of the abuses against which the Act was aimed." Cf. Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 458, 1 L.Ed.2d 972, 981, 77 S.Ct. 912, 918 (1957).

* The fact that employment is affected or at issue does not make a controversy between two employers or between two unions into a "labor dispute" within the meaning of the Act. See: Bakery Sales Drivers Local Union No. 33 v. Wagshal, 333 U.S. 437, 92 L.ed.2d 792, 68 S.Ct. 630 (1948).

A review of the cases brought under Section 301(a) for injunctive enforcement of jurisdictional agreements between unions indicates that judicial jurisdiction to grant or deny such relief is not limited by either the substantive or the procedural provisions of Norris-LaGuardia. Cf. Int'l Hod Carriers Local 33 v. Mason Tenders District Council, supra, (summary judgment for defendant); Int'l Br'd of Firemen and Oilers v. Int'l Ass'n of Machinists, supra, (permanent injunction by summary judgment for plaintiff); United Textile Workers v. Textile Workers Union (preliminary injunction granted); Local 2608, Lumber & Sawmill Workers v. Millmen's Local 1495, 169 F.Supp. 765 (N.D.Cal.1958) (preliminary injunction denied). And see: Parks v. International Brotherhood of Electrical Workers, supra, 314 F.2d at 917-919.

In National Association of Letter Carriers v. Sombrotto, supra, 449 F.2d 915 (2nd Cir. 1971), this Court was faced with a request for relief that was in fact barred by Section 4 of Norris-LaGuardia. In that case, the plaintiff-appellant national

* United Brick & Clay Workers v. District 50, 345 F.Supp. 495, 496-498 (E.D.Mo.1972), cited by Appellants, is apparently the only recorded instance in which a court expressed a contrary opinion. The expression is dicta, since the court found the agreement at issue to be founded upon a mistake of fact, and hence voidable by either party. And the difficulty which the court faced in distinguishing cases contrary to its view indicates the degree to which its view is and was contrary to the established law. It distinguished three of the four cases that it considered on the ground that they each in some way involved agreements subject to arbitration clauses. Though its basis for distinguishing them was Boys Markets, supra, it neglected to note that each of them was decided before Boys Markets. Even so, it could not distinguish the Parks case, supra, on that ground and was therefor forced to even finer distinctions.

It should be noted that the agreement involved in the instant case is subject to arbitral provisions; hence on the reasoning of United Brick & Clay Workers, assuming such reasoning be accepted, this case is distinguishable from it on the very ground specified by that court.

union sought to enforce a trusteeship over an affiliated local for the purpose of blocking it from striking. As this Court noted, since the acts which the parent sought to enjoin were specifically protected by Norris-LaGuardia, there was a need for the federal courts to seek to accommodate Norris-LaGuardia to the policies expressed in later statutes, including the trusteeship provisions of Landrum-Griffin; Ibid, 449 F.2d at 919.

Accommodating Norris-LaGuardia to later expressions of Congressional policy led this Court to the conclusion that "... the anti-injunction provisions of Norris-LaGuardia are inapplicable and a federal court has jurisdiction to grant injunctive relief to a parent union acting pursuant to the union constitution," in a case such as that one. Ibid. This holding applied not only to Section 4 of Norris-LaGuardia, but to Section 7 as well. For this Court, in reversing denial by the district court of the preliminary injunction, did not merely remand for further proceedings but instead, finding the record more than adequate to determine the probable merit of the claim (Ibid, at 921), directed that the preliminary injunction be granted (Ibid, at 923).

There appears to have been no hearing at all in the court below, and there was surely no evidentiary hearing on appeal. Moreover, the urgency that had led to early consideration by the district court had largely (or entirely) disappeared by the time of appellate consideration (Ibid, at 917-918). This Court's direction of a preliminary injunction may be taken, therefore, as a ruling that the procedural provisions of Section 7 were

inapplicable. As noted above, the Fifth and Seventh Circuits appear to have taken the same view; cf. Int'l Br'd of Firemen and Oilers v. Int'l Ass'n of Machinists, supra; United Textile Workers v. Textile Workers Union, supra,

It would appear, then, that Norris-LaGuardia has no applicability to a suit for enforcement of a work assignment jurisdiction agreement voluntarily entered into between labor unions. Hence neither the procedural provisions of the Act, among them Section 7, 29 USC 107, nor the substantive provisions of Section 4, have any application here.

On the other hand, if we assume arguendo that Norris-LaGuardia is applicable, it would still appear that no hearing, as mandated by Section 7, was required here. For it appears probable that, assuming the Act's applicability, what the Supreme Court said in Lincoln Mills, supra, 353 U.S. at 458-459, 1 L.Ed.2d at 981-982, 77 S.Ct. at 918-919, is likewise applicable:

"Though a literal reading might bring the dispute within the terms of the Act..., we see no justification in policy for restricting § 301(a) to damage suits, leaving specific performance of a contract to arbitrate grievance disputes to the inapposite procedural requirements of that Act.... The congressional policy in favor of the enforcement of agreements to arbitrate grievance disputes being clear, there is no reason to submit them to the requirements of § 7 of the Norris-LaGuardia Act."

Plainly, the Congressional policy in favor of the enforcement of voluntary agreements between unions establishing work jurisdiction is at least as clear as the policy in favor of enforcement of agreements to arbitrate. If, as Lincoln Mills, supra, appears to establish, the latter are not subject to Section 7's requirements, there is no reason to submit the former to those requirements. And cf.

United Steelworkers v. Enterprise Corp., 363 U.S. 593, 4 L.Ed.2d 1424, 80 S.Ct. 1358 (1960); Boys Markets v. Retail Clerks Union, supra, 398 U.S. 235, 249-253, 26 L.Ed.2d 199, 209-212, 90 S.Ct. 1583 (1970).

Some question as to the reach of the holding in Lincoln Mills ruling, quoted supra, has been raised by this Court's dictum in Hoh v. Pepsico, Inc., 491 F.2d 556, 560 (2nd Cir. 1974), following a view expressed by Judge Gibbons for the Third Circuit, that Section 7 of Norris-LaGuardia may remain applicable to some suits involving enforcement of arbitration clauses in collective bargaining agreements, "so far as consistent with the policies of § 301," as interpreted in the dissenting opinion in Sinclair Refining Co. v. Atkinson, 370 U.S. 195, 215, 8 L.Ed.2d 440, 453, 82 S.Ct. 1328 (1962), which was approved in Boys Markets. It would appear unlikely that the Hoh dictum has relevance here, since no collective bargaining agreement is involved here and no employer-employee dispute (not even in a non-"proximate" relation; see: 29 U.S.C. 113(c)) is present here. And the features of Hoh that distinguished it from Lincoln Mills have no bearing here. But even if what this Court said in its dictum in Hoh, supra, were applied here, it would remain true that on the undisputed facts below, the balance tipped decisively in favor of Appellees, and the other criteria governing the issuance of a preliminary injunction were met. And as this Court commented, in the course of its Hoh dictum, at loc.cit.,

"Perhaps, despite this, a court might issue an injunction against an employer without taking testimony if on the undisputed facts the balance tipped decisively in favor of the unions and the other criteria governing the issuance of injunctions were met."

And Judge Gibbons's view plainly requires "accommodation" in this regard between Section 301 and Section 7. Even where Section 7 is assumed to apply, a hearing as mandated by it is unnecessary and undesirable where an application for an injunction can be considered on affidavits and verified complaint alone. As Judge Gibbons commented, writing for the Third Circuit in Celotex Corp., Pittston Plant v. Oil Chemical and Atomic Workers, 516 F.2d 242, 247 (3rd Cir. 1975),

"Here is an instance where accommodation between § 301 and § 7, rather than rigid application of the latter, is appropriate. Obviously, some matters, such as the existence of the contractual relationship relied upon, are not particularly suitable for oral testimony, and the district court should be permitted to rely on an affidavit or verified complaint identifying the document."

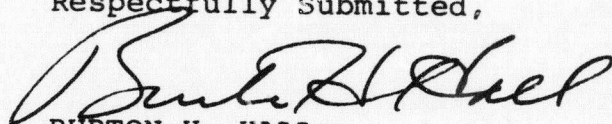
Only where the disputed questions are thrown into doubt, or where affidavits may paint an exaggerated picture of harm, is live testimony appropriate. And even where appropriate it is not necessarily required.

It follows, therefore, that even if the injunctive relief that was granted below is deemed to come within the range of Norris-LaGuardia, and even if Section 7's requirement of a hearing is applicable to it despite the Supreme Court's holding in Lincoln Mills, supra, then even so the absence of an evidentiary hearing below is not error, and certainly not an abuse of discretion, in view of the fact that the Court below had before it affidavits, documentary exhibits, and a verified complaint, setting forth undisputed facts sufficient for it to make its determination.

CONCLUSION

For all the reasons set forth above, and set forth in the Opinions of the Court below, the decision of the Court below should be affirmed and the Order of the Court below allowed to go immediately into effect.

Respectfully Submitted,

A handwritten signature in dark ink, appearing to read "Burton H. Hall", written in a cursive style.

BURTON H. HALL
Attorney for Appellees
401 Broadway
New York, N.Y., 10013

(212) 431-9114

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DRYWALL TAPERS AND POINTERS OF GREATER NEW YORK,
LOCAL 1974,

and

CHARLES LONG, PASQUALE DE ROSA, ALBERT ZAPPY, HARRY
EDWARDS and ANTHONY DEL GAIS, each of them individually
and on behalf of all other persons, members of Local 1974
working or seeking work as drywall tapers within the
jurisdiction of such labor organization, similarly
situated,

Appellees,

against

OPERATIVE PLASTERERS' AND CEMENT MASONS' INTERNATIONAL
ASSOCIATION OF THE UNITED STATES AND CANADA, OPERATIVE
PLASTERERS LOCAL 60, OPERATIVE PLASTERERS LOCAL 202, and
OPERATIVE PLASTERERS LOCAL 852,

Appellants.

AFFIDAVIT
OF SERVICE
BY MAIL

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

Rose Rinella, being duly sworn, deposes and says that he
is over the age of 18 years, is not a party to the action, and resides
at 951 East 17th Street, Brooklyn, New York, 11230
That on April 19, 1976, she served 2 copies of Appellees'
Brief

on O'DONOGHUE & O'DONOGHUE,
DONALD J. CAPUANO
GLENN V. WHITAKER
1912 Sunderland Place, N.W.
Washington, D. C. 20036

COHEN, WEISS AND SIMON
ROBERT S. SAVELSON
605 Third Avenue
New York, New York 10016
Attorneys for Appellants.

by depositing the same, properly enclosed in a securely-sealed,
post-paid wrapper, in a Branch Post Office regularly maintained by
the United States Government at 350 Canal Street, Borough of Manhattan,
City of New York, addressed as above shown.

Sworn to before me this
19th day of April, 1976

..... Rose Rinella

John V. D'Esposito
JOHN V. D'ESPOSITO
Notary Public, State of New York
No. 30-0932350
Qualified in Nassau County
Commission Expires March 30, 1977